

No. 75024-6

ALEXANDER, C.J. (dissenting)—We granted review in this case to determine primarily what definition of “disability” should control for purposes of disparate treatment claims brought under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. Should it be the definition of “disability” articulated by this court in *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 640, 9 P.3d 787 (2000) for failure to accommodate claims or the definition of “disability” promulgated by the Washington State Human Rights Commission in WAC 162-22-020? The majority has seen fit to answer this “either/or” question by responding with an affirmative “neither.” Rather than working within the confines of Washington law and jurisprudence, the majority imports the definition of “disability” set forth in the federal Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, a definition not advocated by either party in this case. It then extends the federal ADA definition to cover failure to accommodate claims brought under the WLAD. Given that the majority opinion does not answer the question upon which we granted review, improperly disregards a properly promulgated state regulation, subjects this court to a charge of “legislating from the bench,” and

effectively and needlessly overturns our decision in *Pulcino*, I dissent.

Although I agree with the bulk of the dissenting opinion's analytical framework for why the WAC disability definition should be the controlling definition for disparate treatment claims, I find that I am unable to concur in the underlying holding of that opinion. Even under the dissent's new reading of the WAC definition, I believe the trial court's order dismissing on summary judgment Kenneth McClarty's disparate treatment claim should be upheld. I say that because the record establishes that McClarty fails to establish a prima facie case of disparate treatment and/or to show evidence of Totem Electric's discriminatory motive. Therefore, I write a separate dissent.¹

The central issue in a disparate treatment claim is whether McClarty's employer, Totem Electric, acted with a discriminatory intent or motive. *Parsons v. St. Joseph's Hosp. & Health Care Ctr.*, 70 Wn. App. 804, 807, 856 P.2d 702 (1993). The burden of persuasion remains with the plaintiff at all times. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*,

¹Justice Owens is correct that the trial court granted summary judgment primarily because McClarty was unable to show, under the *Pulcino* disability definition, that his carpal tunnel syndrome had a "substantially limiting effect upon [his] ability to perform his . . . job." Dissent (Owens, J.) at 19 (alteration in original) (quoting *Pulcino*, 141 Wn.2d at 641). However, the flaw in my colleague's criticism of my position, as she acknowledges, is that this court may affirm the trial court on any ground supported by the record, even when that ground was not considered by the trial court. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (citing *Reed v. Streib*, 65 Wn.2d 700, 709, 399 P.2d 338 (1965); see Dissent (Owens, J.) at 20 n.3. As the trial record demonstrates, the only evidence of discrimination McClarty presented is his naked assertion in his own declaration that he was told he was fired because of his having carpal tunnel syndrome. Clerk's Papers at 56. As discussed in this opinion, the weight of Washington authority suggests that a plaintiff's unsupported allegation of unlawful discrimination is not sufficient to withstand a summary judgment motion.

450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). As a result, McClarty has to show that Totem Electric intentionally discriminated against him.

In order to establish a state law claim of disparate treatment discrimination, McClarty must first set forth a prima facie case of unlawful discrimination. A prima facie case of termination based on a disability is established if the claimant shows that he or she belongs to a protected class (i.e., is disabled), was discharged, was doing satisfactory work, and was replaced by someone not in the protected class. *Parsons*, 70 Wn. App. at 808-09. If the claimant in this case, McClarty, fails to make his prima facie case of discrimination, Totem Electric is entitled to “prompt judgment as a matter of law.” *Hill*, 144 Wn.2d at 181 (citing *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 490, 859 P.2d 26, 865 P.2d 507 (1993) (citing *Burdine*, 450 U.S. at 254)).

Applying the WAC definition as articulated by the dissent, and taking the evidence considered by the trial court and all reasonable inferences therefrom, I conclude that McClarty presented sufficient evidence in the form of a doctor’s release that he was diagnosed as having bilateral carpal tunnel syndrome, which would constitute a physical abnormality. Therefore, McClarty established that he was disabled as that term is used in RCW 49.60.180. In addition, there is no dispute that McClarty was discharged. McClarty failed, however, to present sufficient evidence demonstrating he was intentionally discriminated against because of his disability.

In support of my determination that McClarty presented insufficient evidence to survive summary judgment, I note that the record demonstrates that McClarty was not

doing satisfactory work as an apprentice electrician. By his own admission, McClarty was the least skilled of the project's two apprentices, and he struggled to learn without first being shown how to do the tasks assigned to him. Due to his lack of success at learning to install conduit, McClarty had been reassigned from doing inside electrical work to work involving digging and leveling trenches and jack-hammering. Furthermore, McClarty's overall work performance on the job site was less than stellar. A work evaluation dated nine days prior to McClarty's termination rated his overall performance on the job as "below average." Clerk's Papers at 122. Finally, during a deposition, McClarty acknowledged that he received negative evaluations of his electrical work. As a result, it can be said that McClarty failed to show he was doing satisfactory work and, consequently, he does not establish as a matter of law a prima facie case of disparate treatment.

Even if one assumes McClarty met his initial burden of establishing a prima facie case of discrimination, he fails to show that Totem Electric acted with discriminatory intent. McClarty stated in his deposition that at the time of his termination all of the ditches of any consequence had been dug. He also stated that he was in the process of filling in one of the last ditches when he received his notice of termination and that any remaining work involving digging involved less than one-third of a day. Additionally, Totem Electric provided sufficient evidence that it had no light duty work available at the time it laid off McClarty and no other work to assign him given his low skill level. Furthermore, McClarty does not present any direct evidence that his

medical condition was discussed in any performance review or referenced in the notice of termination. Thus, McClarty fails to present evidence establishing an improper connection between Totem Electric's employment decision and McClarty's carpal tunnel syndrome.

Indeed, the evidence shows that McClarty was terminated because his services were no longer needed. McClarty makes a bare assertion that Rick Sare, Totem's general foreman on the project site, told him on the day of his termination that his diagnosis of carpal tunnel syndrome was the basis for the termination. See CP at 54. Such an assertion is not, however, sufficient to establish that Totem Electric's reason for laying him off was a mere pretext for discrimination and does not give rise to a reasonable inference of discrimination. *Accord Parsons*, 70 Wn. App. at 811; *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 361, 753 P.2d 517 (1998) (employer's summary judgment motion affirmed where plaintiff/employee's allegations of unlawful discrimination were supported only by his own affidavit and were unsupported by specific evidence).

The gravamen of a plaintiff's disparate treatment claim is proving the employer's discriminatory intent. See *Hill*, 144 Wn.2d at 186-87. Contrary to what McClarty asserts, the evidence here does not show that Totem Electric terminated his services for a discriminatory reason, or that the company treated McClarty in any unequal way.

In sum, McClarty has failed to show that there is an issue of fact for the jury and, consequently, the trial court properly granted summary judgment on McClarty's

disparate treatment claim under RCW 49.60.180(2). Therefore, I would reverse the Court of Appeals, thereby affirming the decision of the trial court.

AUTHOR:

Chief Justice Gerry L. Alexander

WE CONCUR:
